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NO. 90-650

Supreme Court, U.S.

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JOSEPH F. SPANGL, JR.
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In The Supreme Court of the United States
October Term, 1990

DR. EZZAT MAJD POUR
PETITIONER

VERSUS

MISSISSIPPI MEDICAL LICENSURE BOARD
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATE OF MISSISSIPPI

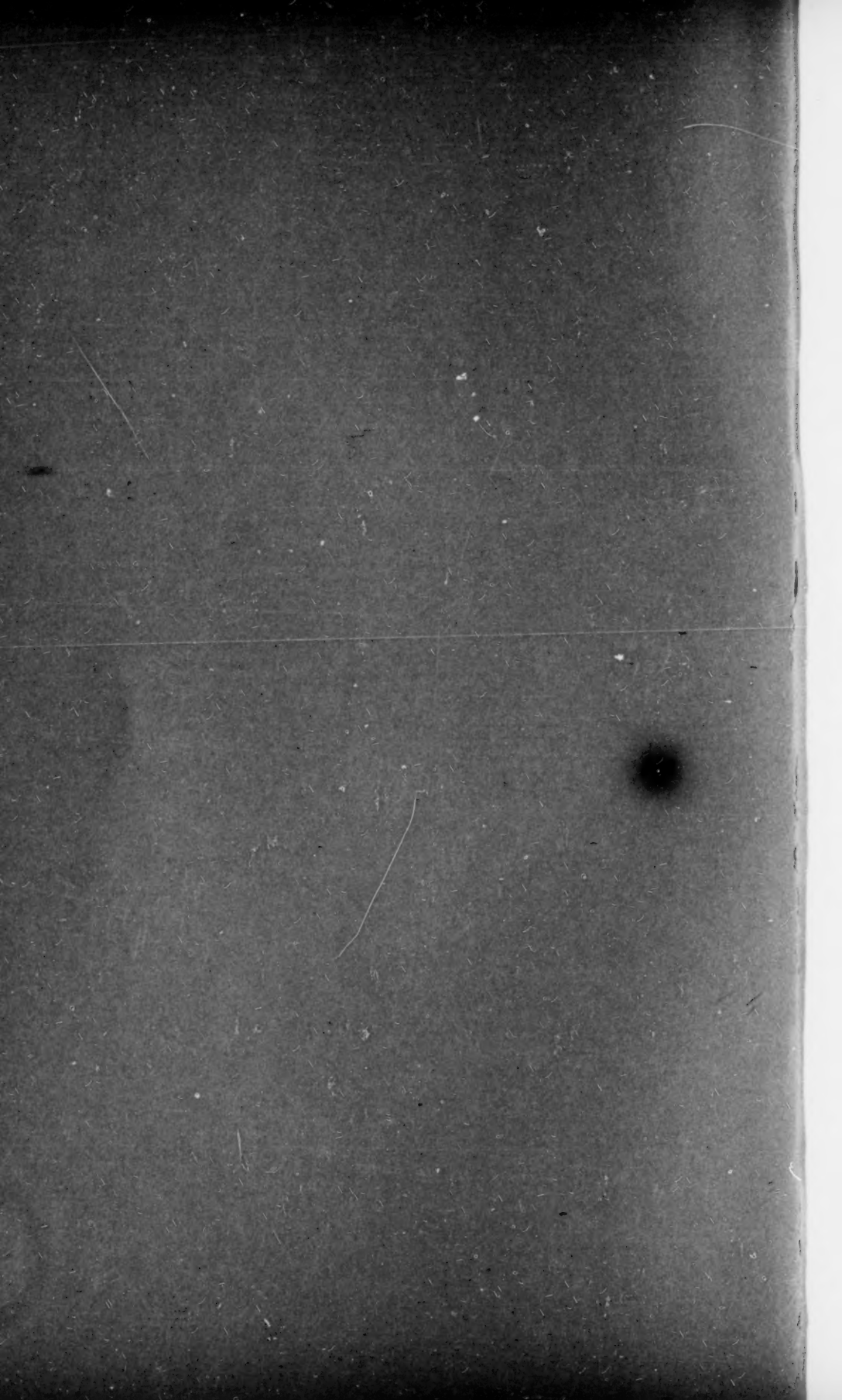
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QUESTIONS PRESENTED

1. Whether reinstatement of a medical doctor's license following suspension of the license by a state board of medical licensure renders a constitutional challenge to the board's suspension of the license moot.

2. Whether due process requires extension of the "clear and convincing" standard of proof to state medical licensing board decisions.

3. Whether due process prohibits suspension of a medical license by a state board of medical licensure when there is evidence in the record to support a finding by the board that the doctor was unable to practice medicine with reasonable skill and safety to patients because of mental illness.

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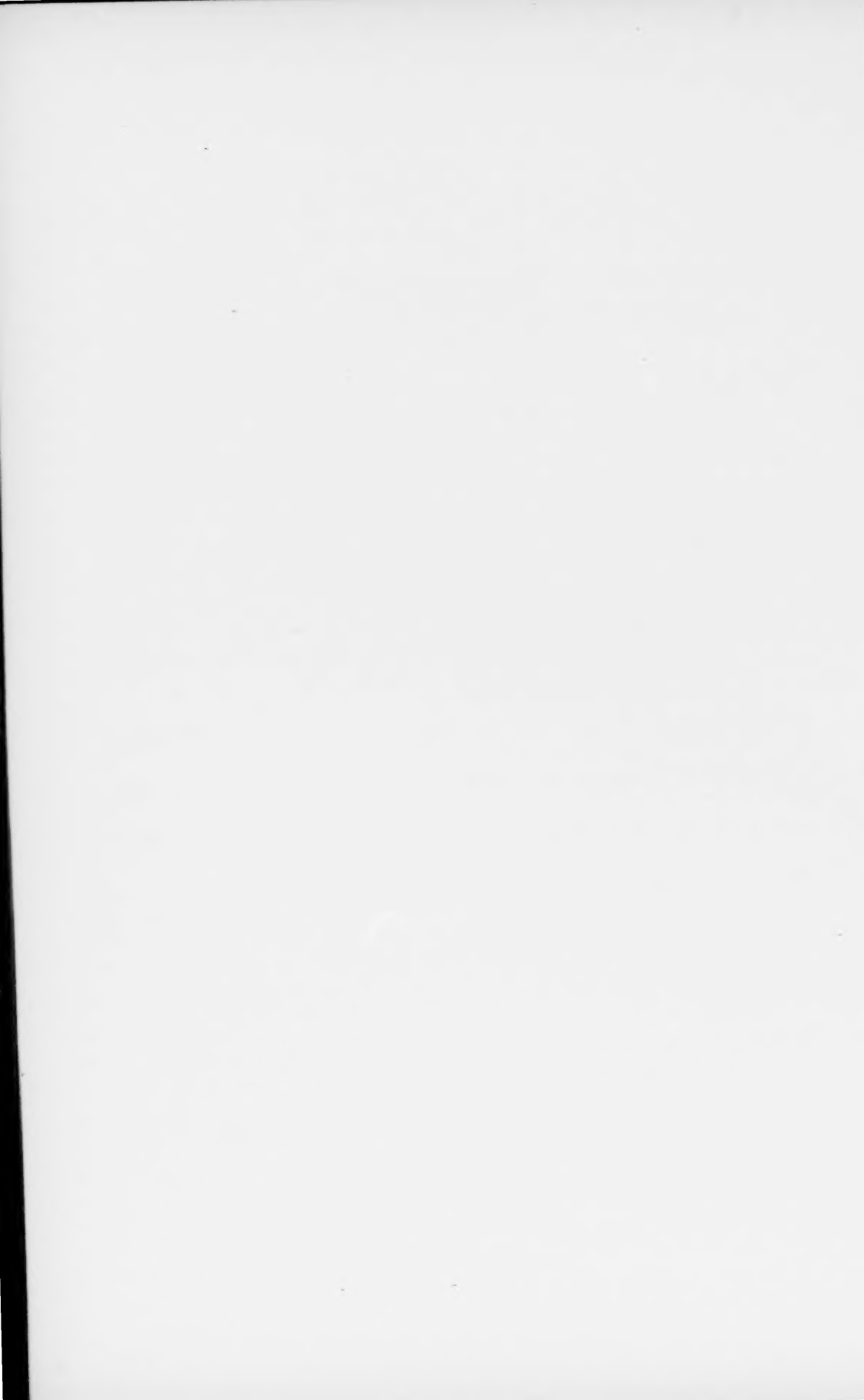


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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

DR. EZZAT MAJD POUR,
Petitioner

v.

MISSISSIPPI MEDICAL LICENSURE BOARD,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

Respondent, Mississippi Medical
Licensure Board, respectfully prays that
the petition for Writ of Certiorari to the
United States Court of Appeals for the
Fifth Circuit be denied in this case.

OPINION BELOW

The unreported opinion of the United
States Court of Appeals for the Fifth
Circuit is attached as an appendix to the
petition for certiorari.



JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari under 28 U.S.C. Section 1254. He fails to do so.

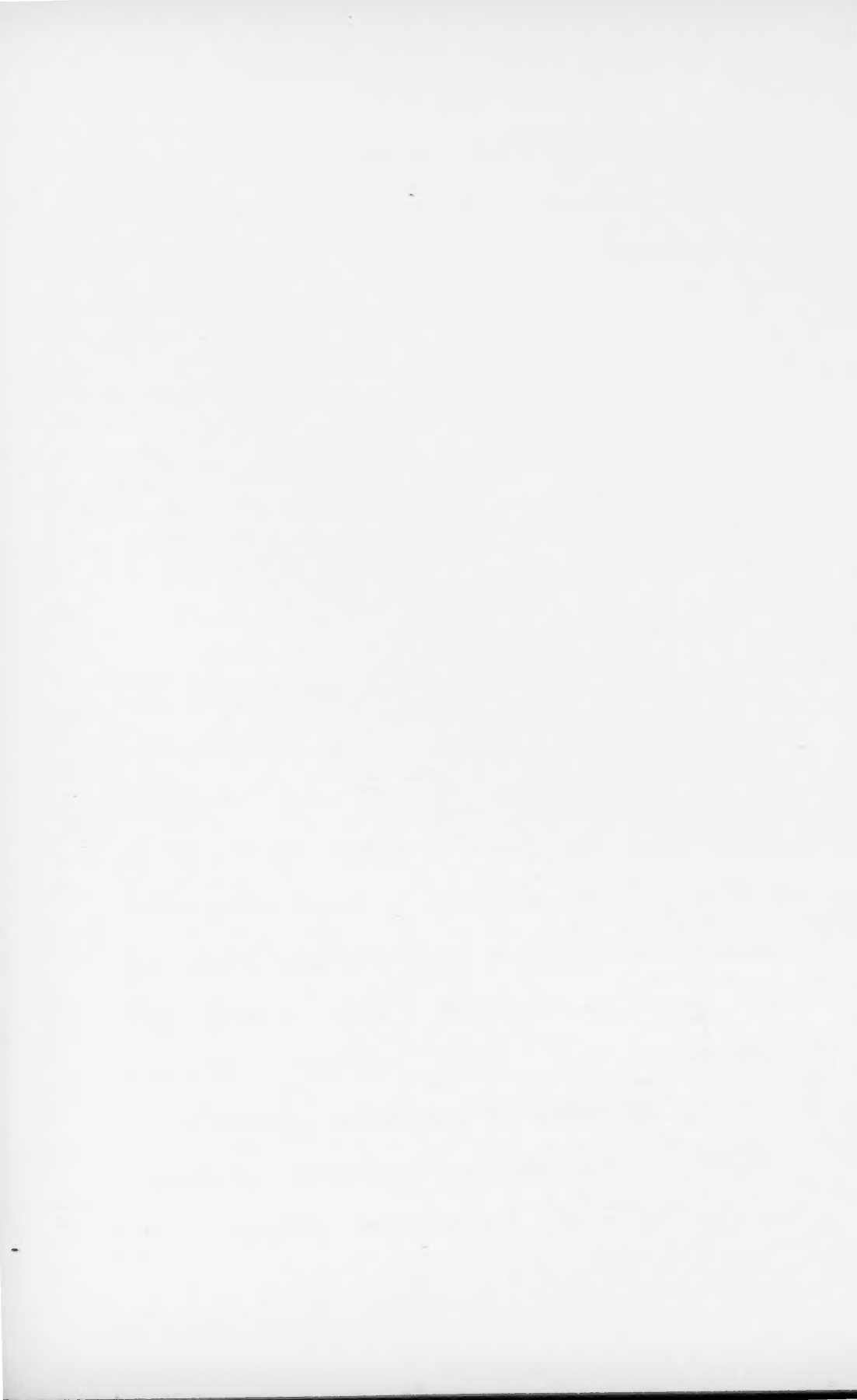
CONSTITUTIONAL PROVISION INVOKED

Petitioner seeks to invoke United States Constitutional Amendment Fourteen.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On July 23, 1987, the Petitioner Dr. Ezzat Majd Pour filed suit against the Mississippi State Board of Medical Licensure ("the Board") under 42 U.S.C. § 1983 in the district court for the southern district of Mississippi, alleging the Board violated the Fourteenth Amendment to the United States Constitution when it suspended his medical license. He sought monetary damages, declaratory and injunctive relief. On



October 7, 1988, Dr. Majd filed an Amended Complaint against the Board and its members seeking declaratory and injunctive relief. The Board moved to dismiss or, in the alternative, for summary judgment. The court referred the case to the United States District Magistrate, John Countiss, III, who conducted a hearing on August 18, 1989, September 11, 1989 and September 15, 1989. The Magistrate found that there was substantial evidence in the record to support the Board's finding that Dr. Majd suffered from a mental illness which compromised his ability to practice medicine with reasonable skill and safety to patients. The magistrate dismissed the action with prejudice, finding no due process violations.

Dr. Majd appealed to the Fifth Circuit Court of Appeals, alleging that the Board's actions violated his right to



substantive due process under the Fourteenth Amendment for three reasons: (1) the Board suspended his license without any substantial evidence that he was unable to practice medicine with reasonable skill or safety to patients by reason of mental illness; (2) the Board failed to adopt a "clear and convincing evidence" standard; and (3) the Board acted arbitrarily and capriciously. The Fifth Circuit found that the record contained evidence to support the conclusions upon which the Board based its decision to suspend Dr. Majd's license and held that there were no due process violations. From the unpublished opinion of the Fifth Circuit affirming the judgment of the magistrate, Dr. Majd brings this petition for certiorari.



B. FACTUAL HISTORY

Dr. Majd was licensed to practice medicine in Mississippi in 1981 and began practicing medicine in Tunica, Mississippi, in 1985. In response to a complaint filed in 1986 and pursuant to statutory procedures set forth in Miss. Code Ann. § 73-25-51 through § 73-25-67, Frank J. Morgan, Jr., M.D., Executive Officer of the Mississippi State Board of Medical Licensure, referred Dr. Majd to the Examining Committee of the Mississippi State Board of Medical Licensure to determine his fitness to practice medicine with reasonable skill and safety to patients.

Dr. Majd appeared before the Executive Committee, which consisted of three medical doctors, Arthur Derrick, M.D., Bruce Atkinson, M.D., and George Hamilton, M.D., on September 18, 1986. As



requested by the committee, Dr. Majd submitted to psychiatric/psychological examinations by a psychiatrist and a psychologist. Dr. Majd chose Rodrigo Galvez, M.D., a psychiatrist, and James E. Stary, Ph.D., a psychologist, and the Board approved both choices. The examinations were conducted on October 6, 8, and 10, 1986. The examiners concluded that Dr. Majd was suffering from a major thought disorder and paranoid state and that he was incompetent, not responsible and was in need of immediate medical treatment. In its final recommendation dated October 16, 1986, the Executive Committee found that Dr. Majd was in need of immediate medical treatment and that his continued practice of medicine constituted an imminent danger to public health and safety.



A hearing was conducted on March 19-20, 1987, before eight of the nine members of the Board. Dr. Majd was present with his attorney. The evidence showed that in 1974 Dr. Majd was diagnosed as suffering from depression and a mild schizoid personality with a final diagnosis of hyperthyroidism, postural hypotension, anxiety depressive reaction and situational stress reaction. There was evidence that Dr. Majd had accused the hospital staff of stealing and killing patients and plotting to murder him and that he had accused a nurse of "being a prostitute" and "turning into a vampire at night," all without any basis in fact. Additional evidence showed that Dr. Majd carried a .38 caliber pistol and had frightened one of his staff with it. There was also evidence that Dr. Majd had scheduled a mastectomy of a patient to be



performed under local anesthesia, but the procedure was cancelled by a supervising physician because it was contrary to sound medical practice. Two Board certified psychiatrists, Rodrigo M. Galvez, M.D. and George Hamilton, M.D., testified that in their opinion Dr. Majd suffered from mental illness that affected his ability to practice medicine and could lead to danger in caring for patients. Dr. Galvez, who had completed a three day comprehensive psychiatric/psychological examination, stated that Dr. Majd was in need of medical treatment and that his continued practice of medicine would create havoc to the public.

Dr. Majd introduced evidence of independent evaluations by four physicians and psychologists, each of whom found that he was not suffering from any psychiatric disorder. However, these examiners



qualified several of their reports by stating that their conclusions were based on information and a patient history provided by Dr. Majd which may have been inaccurate and/or incomplete. Dr. Majd also introduced evidence of an evaluation by a psychologist, William M. Kallman, Ph.D., who described Dr. Majd's conduct as not indicative of "delusional" behavior, but merely "angry exaggerations." Dr. Kallman also found, however, that Dr. Majd might have suffered on one occasion from an "acute paranoid disorder."

The Board, by a 7-0 vote with one abstention, found that Dr. Majd had committed "unprofessional conduct," including "dishonorable or unethical conduct likely to deceive, defraud or harm the public," which is a ground for revocation or suspension of a physician's license pursuant to Miss. Code Ann. § 73-

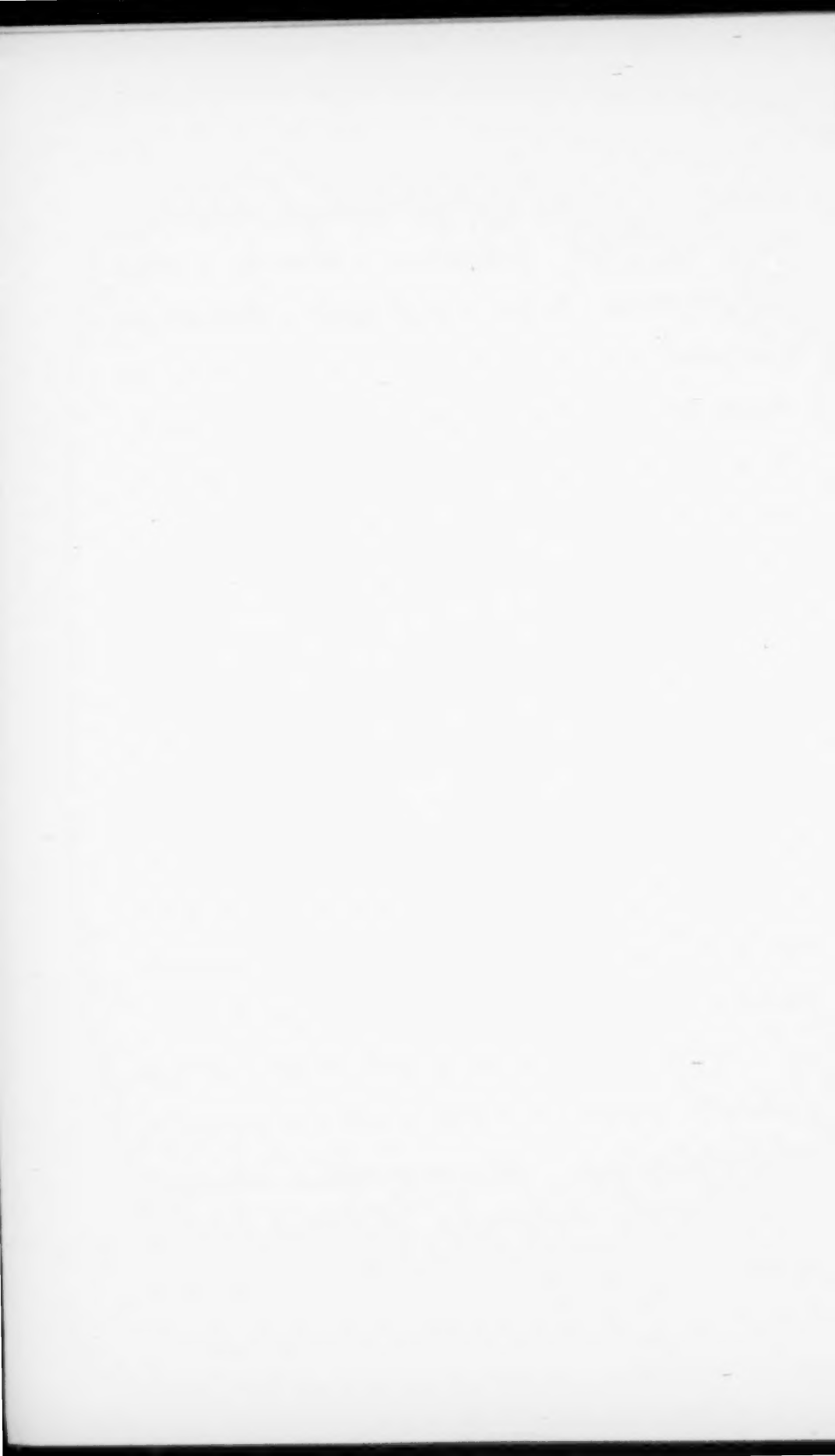


25-29(8)(d). By a 6-1 vote with one abstention the Board also found that Dr. Majd was unable to practice medicine with reasonable skill and safety to patients by reason of mental illness, which is a ground for revocation or suspension of a physician's license pursuant to Miss. Code Ann., § 73-25-53. The Board then ordered that Dr. Majd's license be suspended for three years but provided for a stay of the suspension if, within sixty days, Dr. Majd (1) obtained a physical examination by a Board-approved physician, (2) obtained a psychiatric and psychological work-up with treatment and care by a Board-approved psychiatrist; and (3) provided the Board with monthly progress reports.

Dr. Majd then obtained independent evaluations from a physician, three psychiatrists, and two psychologists, all of whom found that Dr. Majd was not

suffering from any psychiatric disorder. Some of the reports, however, were qualified as being based upon information provided by Dr. Majd, the accuracy of which had not been independently verified. After receiving these additional reports, the Board refused to reinstate Dr. Majd's license, stating that the physician and the psychiatrists had not been approved by the Board prior to their examinations of Dr. Majd and that the evaluations were not in compliance with other conditions specified in its earlier order. The Board gave Dr. Majd an additional sixty days to satisfy the conditions of its earlier order.

After Dr. Majd filed suit in the district court for the southern district of Mississippi, the magistrate referred him to Dr. Thomasina Blissard for a psychiatric evaluation. Dr. Blissard



examined Dr. Majd on June 8, 1989, and concluded that he was "without diagnosable mental illness or disorder and in good mental and emotional health." On June 28, 1989, Dr. Majd applied to the Board for reinstatement of his license. On July 20, 1989, the Board conducted a hearing on Dr. Majd's request. Dr. Blissard testified before the Board and qualified her earlier report based upon materials and information given to her at the hearing which she had not seen previously. Dr. Blissard testified that she could not recommend reinstatement of Dr. Majd's license without the benefit of interviewing him over a period of weeks in different settings. The Board denied Dr. Majd's request for reinstatement. Upon the expiration of Dr. Majd's three-year suspension in March, 1990, Dr. Majd's



license became valid pursuant to Miss. Code Ann. § 73-25-27.

REASONS FOR DENYING THE WRIT

Miss. Code Ann. § 73-25-53 sets forth several conditions under which the Board of Medical Licensure is authorized to restrict, suspend or revoke the license of a physician:

The license of any physician to practice medicine in this state shall be subject to restriction, suspension, or revocation, as hereinafter provided, in case of inability of the licensee to practice medicine with reasonable skill or safety to patients by reason of one or more of the following:

- (a) Mental illness;
- (b) Physical illness, including but not limited to deterioration through the aging process, or loss of motor skill;
- (c) Excessive use or abuse of drugs, including alcohol.

Dr. Majd's petition focuses exclusively on the Board's finding that he was "unable to practice medicine with reasonable skill and safety to patients by reason of mental



illness." The Board's decision to suspend Dr. Majd's license was also based upon its finding that Dr. Majd had engaged in "unprofessional conduct, including dishonorable or unethical conduct likely to deceive, defraud or harm the public," a ground for revocation or suspension of a physician's license pursuant to Miss. Code Ann. § 73-25-29(8)(d) which provides:

The grounds for which a license may be suspended or revoked are:

(8) Unprofessional conduct, which includes:

(d) Being guilty of any dishonorable or unethical conduct likely to deceive, defraud or harm the public.

Dr. Majd does not challenge that finding or the evidence in support of it in his petition for certiorari.

Dr. Majd's license was reinstated at the end of the three year suspension period in March, 1990. Because he has received his requested remedy of



declaratory and injunctive relief, his constitutional challenge to the Board's action of suspending his license is moot.

The Board of Medical Licensure afforded Dr. Majd procedural due process, notice and a hearing at which he was represented by counsel; subsequent to that hearing the Board acted with sufficient evidence in suspending his license to comply with the requirements of substantive due process. The action of the Board was a considered professional judgment by physicians charged with the responsibility to assure minimum standards of care in the practice of medicine in Mississippi and to protect the consumers of rural Mississippi. The district court found there was substantial evidence in the record to support the Board's decision that Dr. Majd suffered from a mental illness which compromised his ability to



practice medicine with reasonable skill and safety to patients. The Fifth Circuit in its unpublished opinion stated, "We conclude, based upon our review of the record, that the Board's actions are the result of carefully considered professional judgments, which are supported by record evidence." The court therefore held that the decision of the Board to suspend Dr. Majd's license did not violate the requirements of the fourteenth amendment. Dr. Majd presents no cognizable claim under the Constitution or statutes of Mississippi, and therefore certiorari should be denied.

ARGUMENT

THE WRIT SHOULD BE DENIED BECAUSE DR. MAJD'S LICENSE HAS BEEN REINSTATED AND THE CASE IS THEREFORE MOOT.

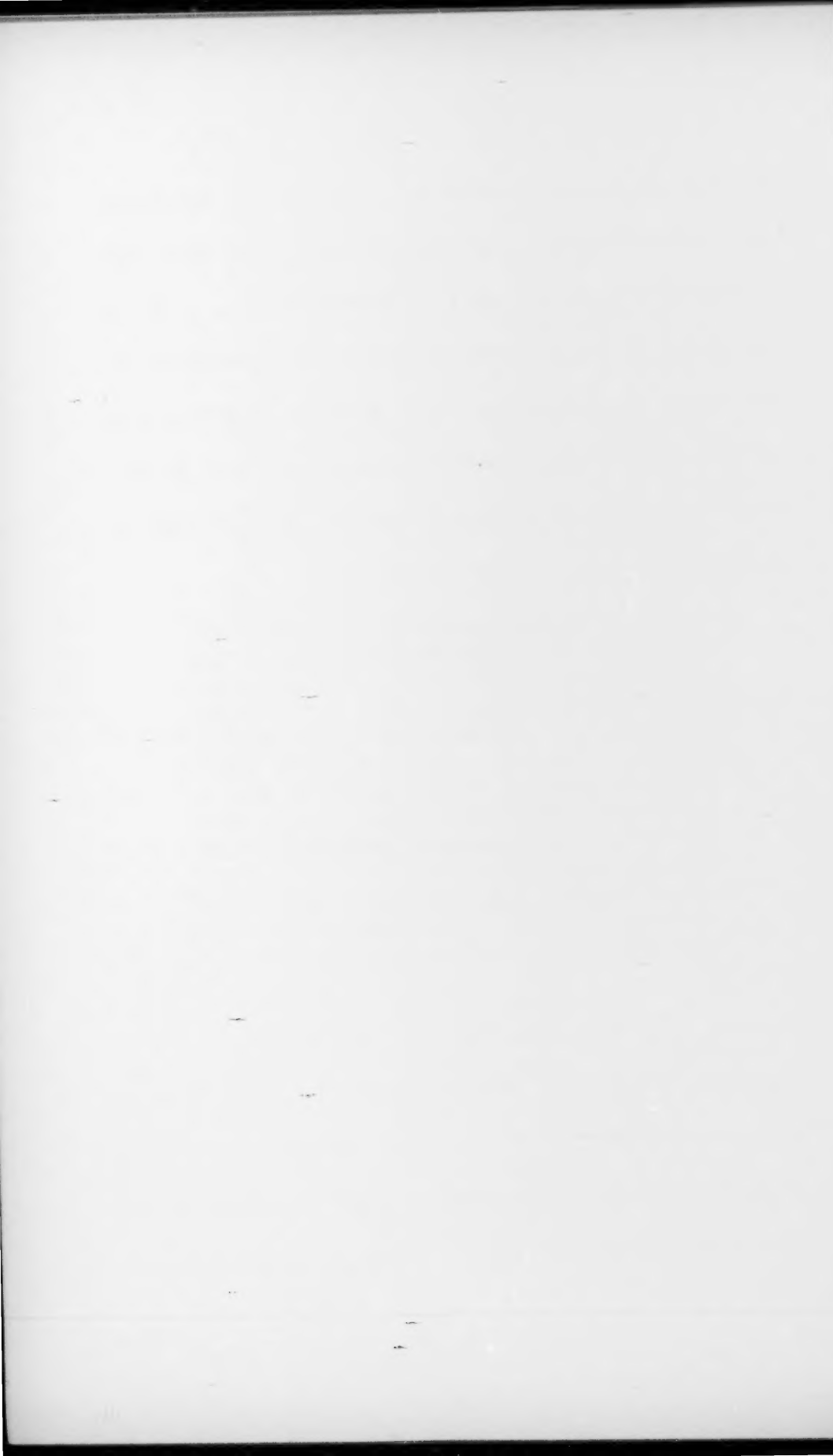
Dr. Majd brought suit on behalf of himself alone and not



as the representative of any class against the Mississippi State Board of Medical Licensure and its members. Upon expiration of the three year suspension of Dr. Majd's license in March, 1990, his license became valid pursuant to Miss. Code Ann. § 73-25-27 which provides in relevant part:

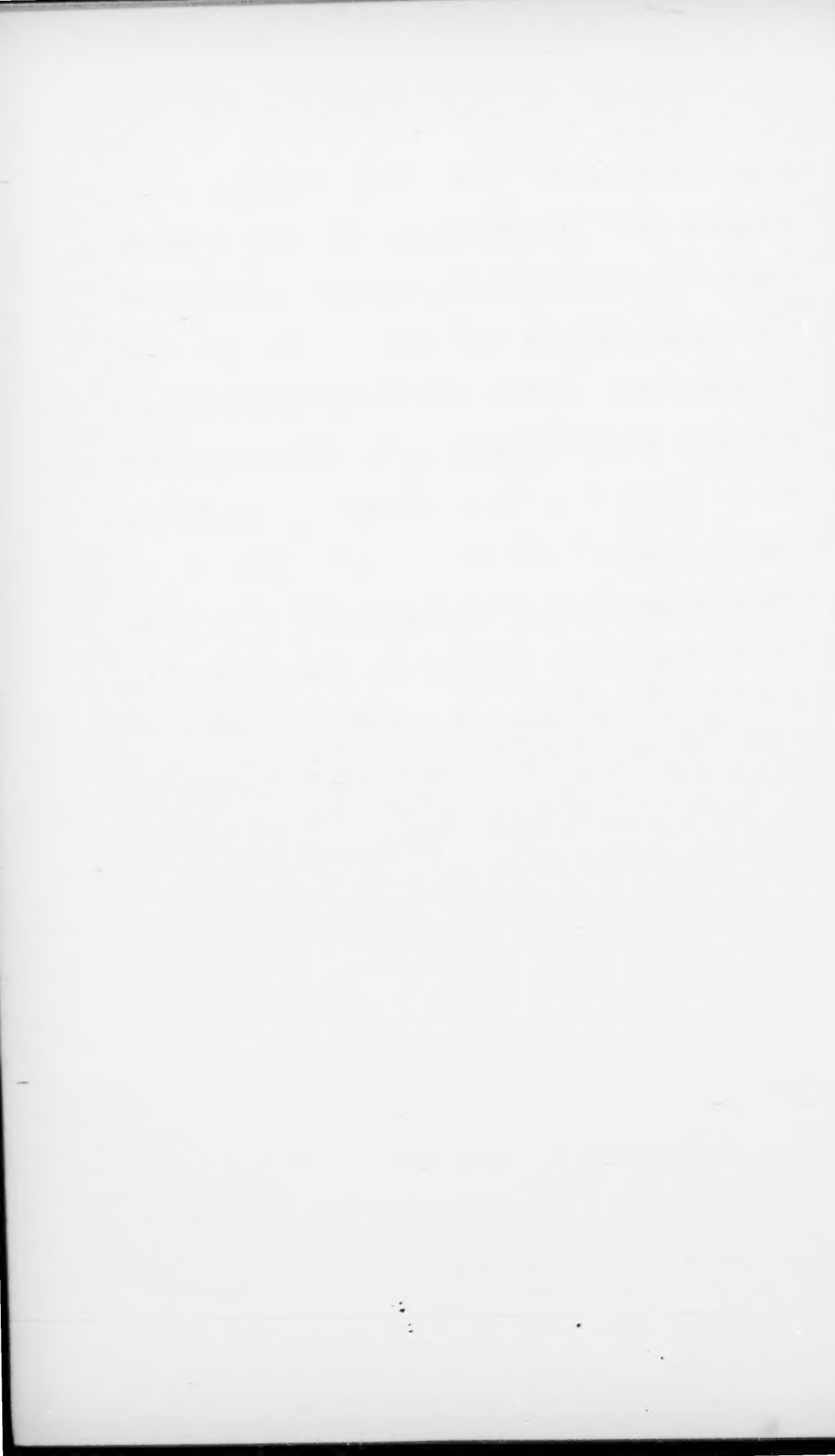
Unless the court otherwise decrees, a license that has been suspended by the Board of Medical Licensure for a stated period of time shall automatically become valid on the expiration of that period and a license that has been suspended for an indefinite period shall become again valid if and when the board so orders, which it may do on its own motion or on the petition of the respondent.

A fundamental principle of jurisdiction is that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." North Carolina v.



Rice, 404 U.S. 244, 246 (1971). The absence of jurisdiction of the Supreme Court "to review moot cases derives from the requirements of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." Liner v. Jafco, Inc., 375 U.S. 301, 306 n. 3 (1964); Powell v. McCormack, 395 U.S. 486, 496 n. 7 (1969); Sibron v. New York, 392 U.S. 40, 50 n. 8 (1968). When a petitioner has obtained his requested remedy, the controversy between the parties is no longer "definite and concrete" and no longer "touch[es] the legal relations of parties having adverse legal interests." Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-241 (1937).

In DeFunis v. Odegaard, 416 U.S. 312 (1973), the petitioner brought suit against a state law school for injunctive



relief after he was denied admission. The Court held that the case was moot because the petitioner was in his final term of law school when the case reached the Court and would complete law school regardless of any decision the Court might reach on the constitutional issues. As in DeFunis, the petitioner seeks a professional status rather than damages and challenges state procedures under which he has been unable to obtain a license to practice a profession. Dr. Majd requests only declaratory and injunctive relief. Because the Board has already reinstated his license, the case is moot. As in DeFunis, any stigma associated with failure to achieve a professional status does not save the case from mootness.

This case is not "capable of repetition, yet evading review" as that



term has been used in cases dealing with mootness. In the absence of a class action, two elements are required to establish that a case is capable of repetition yet evading review:

(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.

Weinstein v. Bradford, 423 U.S. 147, 149 (1975). This case clearly does not satisfy the second element. Dr. Majd has not demonstrated that the possibility that he will come before the Board again for his future practice of medicine is an immediate reality. There is no longer a controversy between the parties arising from the facts of this case.



THE WRIT SHOULD BE DENIED
BECAUSE DUE PROCESS DOES NOT
REQUIRE A STATE BOARD OF MEDICAL
LICENSURE TO ADOPT A STANDARD OF
CLEAR AND CONVINCING EVIDENCE IN
DECISIONS AFFECTING LICENSES OF
PROFESSIONALS.

The Mississippi Board of Medical
Licensure is composed of nine physicians
who have been practicing medicine for at
least six years and who are appointed by
the governor from nominations submitted by
the Mississippi State Medical Association.
Miss. Code Ann. § 73-43-3. The Board has
the responsibility of setting professional
standards for the practice of medicine and
protecting the public from physicians who
may endanger public health and safety
through their practice of medicine. Miss.
Code Ann. § 73-43-11.

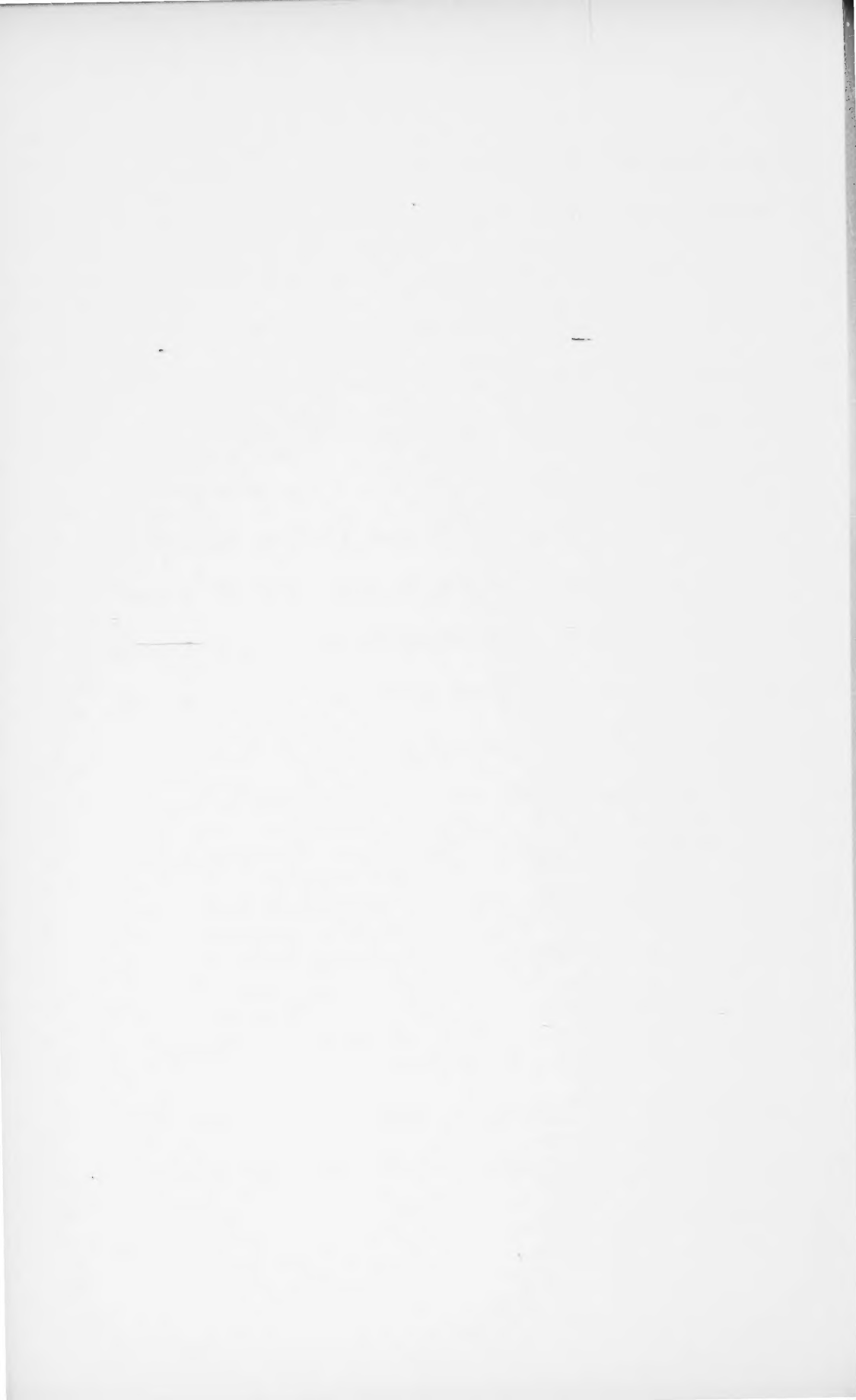
Miss. Code Ann. § 73-25-27 gives a
physician the right to notice and a
hearing before a license can be revoked by

the Board. A physician whose license has been suspended has a right of appeal to chancery court pursuant to Miss. Code Ann. § 73-25-27. The statutory procedures thus guarantee that physicians are afforded procedural due process in licensing decisions by the Board.

The Supreme Court has stated that the purpose of formulating a standard of proof is to assist the factfinder by setting forth the quantum of evidence mandated by the guarantee of due process:

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."

Addington v. Texas, 441 U.S. 418, 423 (1979). The Court has further stated that:



Addington teaches that, in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.

Santosky v. Kramer, 455 U.S. 745, 750 (1982). The Court has noted that a standard of proof is a judicial creation: "The degree of proof required in a particular type of proceeding is the kind of question which has traditionally been left to the judiciary to resolve." Woodby by INS, 385 U.S. 276, 284 (1966).

Although the Supreme Court has held that a "clear and convincing evidence" standard of proof is required "when the individual interest at stake in a proceeding is of particular importance and more substantial than mere loss of money," the Court has limited the application of



that standard to proceedings involving termination of parental rights, involuntary commitment of the mentally ill, deportation of aliens, and denaturalization. Santosky v. Kramer, 445 U.S. 745 (1982)(parental rights); Addington v. Texas, 441 U.S. 418 (1979)(involuntary commitment of the mentally ill); Woodby v. INS, 385 U.S. 276 (1966)(deportation); Chaunt v. United States, 364 U.S. 350 (1960)(denaturalization); Schneiderman v. United States, 320 U.S. 118 (1943)(denaturalization).

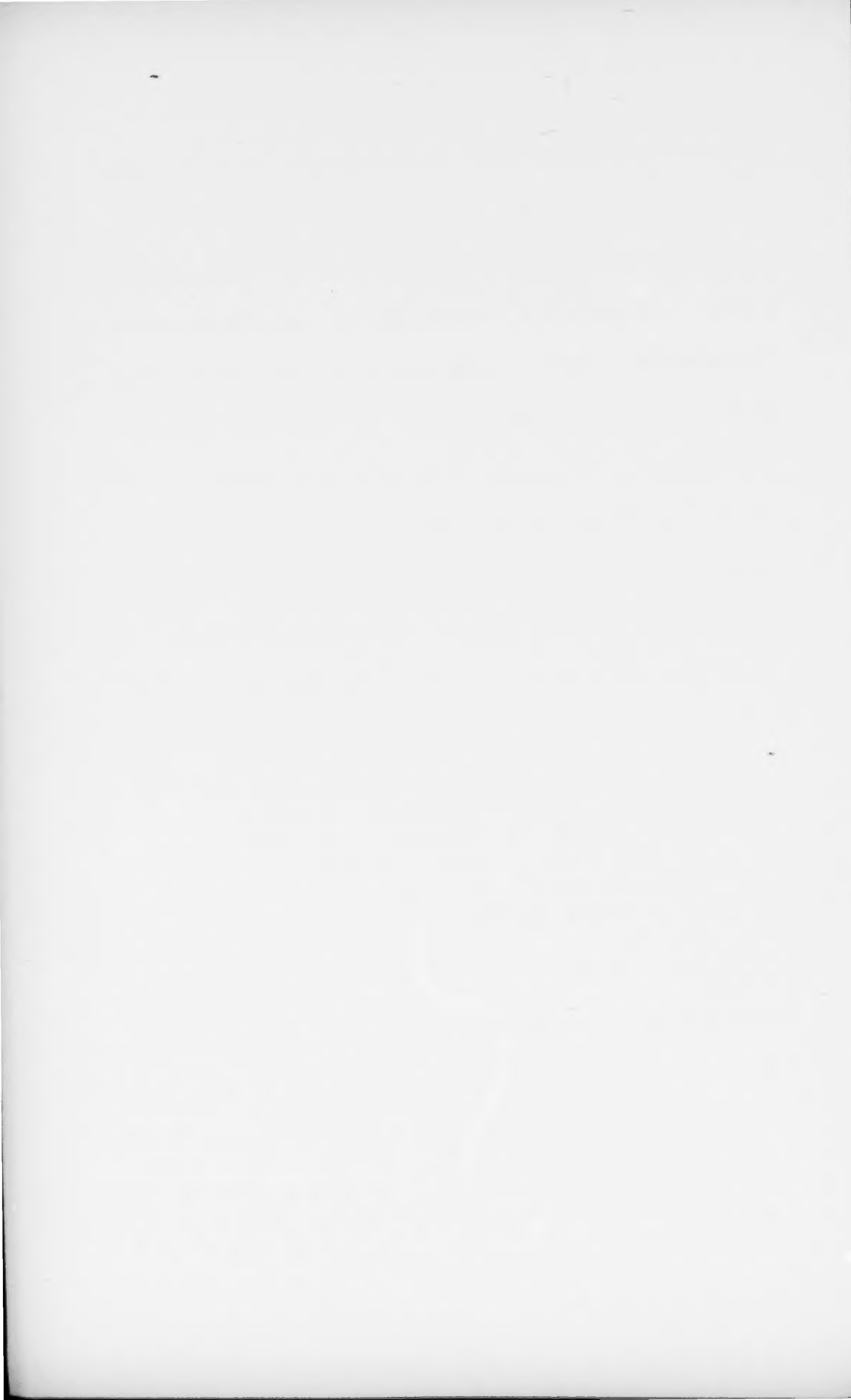
Regulation of the health care professions is left to the states as a proper exercise of their police power in protecting the health, safety and welfare of their citizens. The Supreme Court has not chosen to extend the "clear and convincing" standard of proof to state



medical licensing board decisions and should not do so now. The physicians on the State Board of Medical Licensure must make carefully considered professional judgments when evaluating whether the practice of medicine of a particular physician conforms to minimum standards of care of the profession. The Constitutional guarantee of due process should not mandate that they formally adopt a standard of clear and convincing evidence.

THE WRIT SHOULD BE DENIED
BECAUSE DUE PROCESS REQUIRES
ONLY THAT A FEDERAL COURT OF
REVIEW FIND "SOME EVIDENCE" IN
THE RECORD TO SUPPORT A DECISION
OF A STATE AGENCY

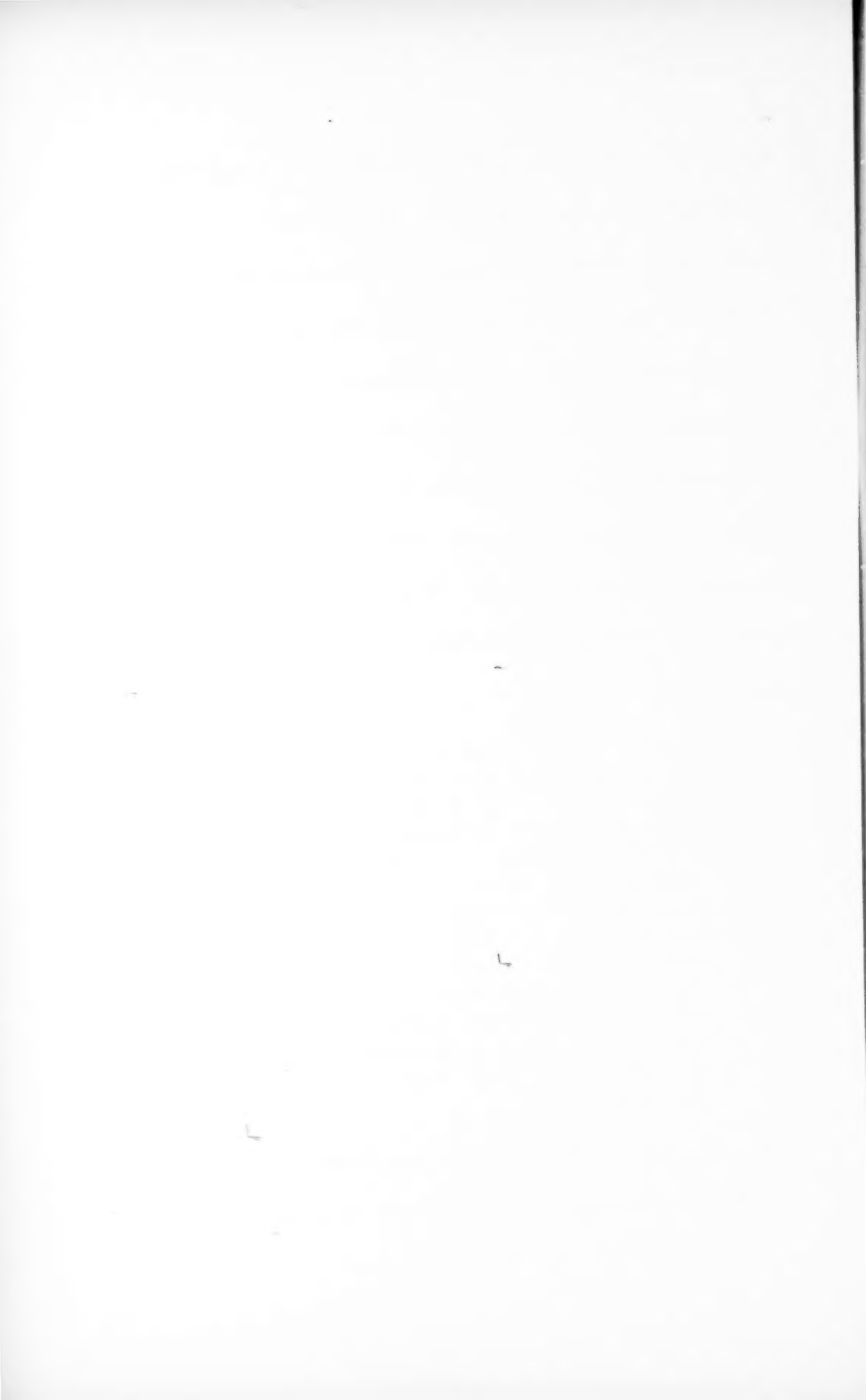
This Court held in Superintendent,
Massachusetts Correctional Institution v.
Hill, 472 U.S. 445, 454 (1985) that the
constitutional guarantee of substantive
due process requires only that a decision



by a state administrative agency be supported by "some evidence" in the record. Stating that "we decline to adopt a more stringent evidentiary standard as a constitutional requirement," Justice O'Connor, writing for the Court, articulated a standard of "some evidence" that is less strict than the substantial evidence test set forth previously to require evidence sufficient as a matter of law:

Requiring a modicum of evidence to support a decision . . . will help to prevent arbitrary deprivations without threatening institutional interests or imposing undue administrative burdens. In a variety of contexts, the Court has recognized that a governmental decision resulting in the loss of an important liberty interest violates due process if the decision is not supported by any evidence.

Id. at 455. The Court emphasized that the "some evidence" test does not authorize a



court to inquire into the sufficiency of the evidence to sustain the finding:

Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board.

Id. at 455-56. See also, Regents of University of Michigan v. Ewing, 474 U.S. 214 (1985)(no due process violation because there was evidence to support decision of university in dismissing medical student); Garner v. Louisiana, 368 U.S. 157, 163 (1961)("some evidence" test does not authorize court to inquire into sufficiency of evidence to sustain finding); Thompson v. City of Louisville, 362 U.S. 199, 199 (1960)(same); Konigsberg v. State Bar of California, 353 U.S. 252,



262 (1957)(due process requires some evidence in the record to support board's decision); United States ex rel. Tisi v. Tod, 264 U.S. 131, 133 (1924)(same).

Clearly, the constitutional guarantee of substantive due process requires only that a federal court of review must find that a state licensing board acted with some evidence in the record in suspending the license of a physician or other professional. The district court found there was substantial evidence in the record to support the decision of the Board. The Fifth Circuit also found no due process violation because there was evidence in the record to support the decision of the Board. It is not the function of the Supreme Court to be the court of last resort for everyone who is dissatisfied with the decisions of state agencies. The role of



the Supreme Court in this case is not to reevaluate the evidence to determine whether the Board made the correct findings of fact or to second-guess the Board's decisions. The Supreme Court must determine only whether there was some evidence in the record to support the Board's decision so that the action was not arbitrary, capricious or irrational. Hill, 472 U.S. at 454. In this case the Board clearly acted with sufficient evidence to meet the requirements of substantive due process.



CONCLUSION

For the above and foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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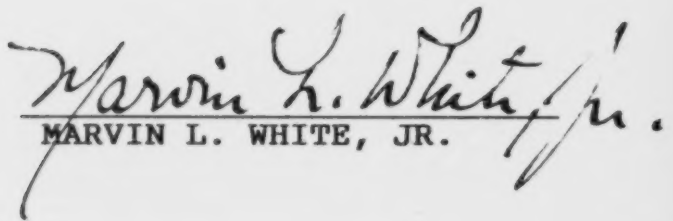
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CERTIFICATE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed , via United States Postal Service, first-class postage prepaid, three (3) true and correct copies of the foregoing Brief in Opposition to the following:

Jim Waide, Esquire
111 South Broadway
Post Office Box 1357
Tupelo, Mississippi 38802

This the 9th day of November,
1990.


MARVIN L. WHITE, JR.